Filed 1/17/19 P. v. Jones CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JEFFREY SCOTT JONES, Defendant and Appellant.	G054848 (Super. Ct. No. 13WF1948) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Affirmed.

Kenneth H. Lewis for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Randall D. Einhorn and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant was charged with sexually abusing his girlfriend's teenage daughter, Madison D. Madison's mother, Cynthia, did not believe the allegations, and she ended up testifying for the defense. During her cross-examination, the prosecutor asked if she believed appellant was capable of molesting Madison, and she said no. Based on that exchange, the trial court allowed the prosecution to introduce evidence of appellant's prior sexual misconduct under Evidence Code section 1108.[1] Even though the court had previously ruled such evidence was inadmissible under section 352, it determined Cynthia's testimony about appellant being incapable of molesting Madison "opened the door" to evidence of appellant's past misdeeds. Therefore, it permitted appellant's ex-wife to testify she and appellant began having sexual intercourse when she was only 17 years old. Claiming this evidence rendered his trial unfair, appellant challenges it on two fronts. First, he contends the prosecutor committed misconduct by eliciting testimony from Cynthia that paved the way for the evidence. And second, he argues the evidence was inadmissible because it was more prejudicial than probative. Finding no basis to reverse, we affirm the judgment.

FACTS

By the time Cynthia met appellant, she had already been in two bad marriages. Her first marriage, during which Madison was born, lasted less than a year. Her second marriage, while longer in duration, was tumultuous: her husband drank heavily and physically abused her. As a consequence of these failed marriages, Madison and her younger sister Savannah "saw a lot" while they were growing up.

After meeting appellant online in December 2010, Cynthia moved into his Huntington Beach home with her daughters just a few weeks later. At that time, appellant was a high school English teacher in his early fifties and Madison was eleven.

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[1] Evidence Code section 1108 is an exception to general rule prohibiting character evidence in criminal trials. It permits the prosecution to introduce evidence of the defendant's prior sexual misconduct to prove he committed the charged offenses, so long as the evidence is not unduly prejudicial under Evidence Code section 352. Unless noted otherwise, all further statutory references are to the Evidence Code.

In the fall of 2012, appellant started molesting Madison while Cynthia was at work. He would have Madison lie down on his bed and would tell her to relax. Then he would kiss her and touch her breasts and genitalia. According to Madison, the molestation occurred every day and escalated into full-on intercourse when she was 13 years old. She told appellant she did not like him touching her, but he said it would ruin his relationship with Cynthia if she reported him, so Madison did not tell her mother. She did, however, confide in her friend Jessica that appellant was raping her.

During this time, Madison and Cynthia did not have a good relationship. On May 10, 2013, Cynthia found a stolen cell phone in Madison's backpack. She looked on the phone and discovered Madison had been posting on Facebook about doing drugs and having sex with boys.[2] A heated argument ensued, and Madison went to her friend Melissa's house. Madison told Melissa and her mother Rosa that Cynthia had kicked her out of the house, and she feared appellant was going to beat her if she went home.

When appellant went to Melissa's house to get Madison, Rosa told him Madison was frightened, and she was not going to let him take her home. Tensions mounted, and appellant ended up calling the police. He told responding officer Alan Cauoette that Madison had run away and he wanted to take her home. Cauoette then spoke with Madison, who was crying and upset. She said she did not want to go home because appellant had been sexually abusing her. She alleged the abuse started in September and had last occurred the previous evening.

Cauoette did not discuss these allegations with appellant. He simply told him he was going to take Madison to a shelter for the night. In fact, Cauoette brought Madison to the police station for additional questioning. She alleged appellant had molested her 100 times and raped her on 4 or 5 occasions, including the previous night, May 9, and five days earlier, on May 4. Madison said appellant ejaculated on both

[2] At trial, Madison testified she bragged about being promiscuous online to look cool and impress her friends, but she was actually a drug-free virgin up until the time appellant started raping her.

occasions, and during the May 9 incident she saw a white substance drip from his penis onto her bed sheets.

Madison was taken to the hospital for a sexual assault examination. She told the examining nurse appellant had sexually molested her and described how he raped her in her bedroom on the 9th and the 4th. The nurse detected a fresh tear to Madison's vagina that was consistent with her allegations. In addition, the nurse collected Madison's underwear and swabbed her cervix for evidentiary purposes. That night, the police collected the sheets from Madison's bedroom and a pair of tan shorts that appellant had worn the previous evening.

Following her examination, Madison was brought back to the police station for further questioning. During a formal interview with investigators, she repeated her allegations that appellant had been molesting her since September and had raped her twice in the last week. Madison made similar allegations when interviewed by a member of the child abuse services team the following month.

During the investigation, Forensic Scientist Heather Pevney of the Orange County Crime Lab examined the cervical swab taken from Madison and detected the presence of semen in the form of a single sperm cell. Her analysis of the sperm revealed it contained a mixture of DNA from at least two people. Madison was found to be the major contributor of the DNA, and appellant could not be eliminated as the second contributor. According to Pevney, the odds of "choosing an individual at random who could not be excluded as that second contributor is more rare than 1 in 60,000 unrelated individuals."

The sperm found in Madison's cervix was also subjected to DNA analysis by Angela Butler, who works for a private laboratory. Using the Y-STR testing methodology, Butler determined the DNA profile of the sperm matched appellant's DNA profile. She estimated 1 in every 5,500 males has that genetic profile.

As for the sheets that were collected from Madison's bedroom, they tested negative for the presence of semen. However, semen was detected on the tan shorts appellant wore on May 9, 2013, which, according to Madison, was the last time he raped her.

The star witness for the defense was Madison's mother Cynthia. She testified Madison was a disobedient, manipulative child who always had trouble in school and was prone to prevarication. And when she got caught lying about something, she would become angry and defensive rather than admitting her deception. Cynthia said that's what happened when she confronted Madison about the stolen cell phone she found in her backpack on the day she accused appellant of molesting her. Rather than admitting to theft of the phone, Madison flew into a rage and ran away to her friend Melissa's house.

As explained more fully below, Cynthia testified she did not believe Madison's claim that appellant had molested her. Indeed, she felt appellant was incapable of such loathsome conduct. When asked about the DNA evidence indicating appellant was the source of the sperm found in Madison's cervix, Cynthia said, "It's not that I don't want to believe [the allegations]. I've learned a lot through all of this. It's not just black and white."

Cynthia offered an alternative theory as to how appellant's sperm may have ended up in Madison's cervix, other than through sexual intercourse. Cynthia claimed she and appellant had sex just about every day, and when they were finished, she would wipe her genital area with a washcloth. Then she would rinse out the washcloth and hang it in the bathroom that Madison used. Based on this testimony, defense counsel posited appellant's sperm may have been transferred from the washcloth to Madison's cervix while she was using it in the shower.

On rebuttal, the prosecution called Cynthia's mother Eva to the stand. She testified Cynthia lied to her all the time and was mean to Madison, whom she described

as sweet and honest. The prosecution also called Nancy O. to refute Cynthia's claim that appellant was incapable of committing the alleged offenses.

Nancy testified she met appellant at school when she was 14 years old. He taught at her high school and was her English teacher in the 11th and 12th grade. At that time, appellant was in his mid-thirties. He had his students keep a journal about their personal lives, so he knew Nancy came from a broken home and had been sexually abused as a child. Appellant gave Nancy his phone number and befriended her. And when she graduated from high school and started community college, he invited her to live with him, ostensibly so she could be closer to her school. Nancy accepted the offer and moved into appellant's home in the fall of 1997. At that time, she was 17 years old and did not know appellant was married to a woman named Gabriela. Nancy saw Gabriela around appellant's house from time to time, but appellant claimed she was only his roommate.

Shortly after moving into appellant's house, Nancy began a sexual relationship with appellant. Nancy had been a virgin up until then, but one night while she was talking to appellant about her past sexual abuse, he started massaging her back and cradling her. Appellant assured Nancy she would always be safe with him. Then he led her into the bedroom and they had sexual intercourse. This incident occurred just a few weeks before Nancy's 18th birthday.

Over time, Nancy fell in love with appellant and became pregnant with his child. Gabriela didn't seem to have a problem with Nancy living at the house. However, when she found out appellant had impregnated her, she got very upset and filed for divorce. Nor was appellant pleased about Nancy's pregnancy. He urged her to get an abortion. A miscarriage resolved the issue. Nancy and appellant wed in 2004, seven years after she moved into his house. They were happily married for several years before appellant became physically abusive and Nancy divorced him.

In closing argument, the prosecutor asserted Nancy's testimony showed appellant liked to prey on young girls who were emotionally vulnerable – girls just like Madison. Defense counsel contended appellant's relationship with Nancy was wholly irrelevant because it involved circumstances entirely different from this case. In the end, the jury convicted appellant of two counts of aggravated sexual assault on a child for raping Madison, and one count of continuous sexual abuse. (Pen. Code, §§ 269, subd. (a)(1), 288.5, subd. (a).) The trial court sentenced him to prison for 30 years to life plus 16 years for his crimes.

Alleged Prosecutorial Misconduct

During the course of the trial, the issue regarding the admissibility of appellant's prior sexual misconduct with Nancy was litigated extensively. The trial court originally excluded this evidence on the basis it was too prejudicial. However, in light of Cynthia's testimony on cross-examination, the court reversed course and allowed Nancy to testify that appellant began having sexual intercourse with her when she was only 17 years old.[3] Appellant claims the prosecutor improperly circumvented the court's original ruling by asking Cynthia questions about his character, which opened the door to Nancy's testimony. We find the claim has been forfeited for lack of a timely objection. We also reject appellant's back-up argument that defense counsel was ineffective for failing to object to the prosecutor's alleged misconduct.

Before trial, the prosecutor moved to introduce evidence that appellant had a history of befriending his female students, including Nancy, and luring them into sex with him. The prosecutor argued this evidence was admissible under section 1108 to prove appellant had a propensity for sexual misconduct and was thus more likely to have molested or raped Madison. Defense counsel opposed the evidence on the basis it was too remote and dissimilar to the charged offenses. He pointed out that while Madison

[3] Under Penal Code section 261.5, it is unlawful for a person to have sexual intercourse with a minor.

was only 13 when appellant allegedly raped her, Nancy was almost 18 years old when she began having intercourse with appellant, which was back in the 1990's. And, appellant ended up marrying and having a long-term relationship with Nancy, even though they eventually got divorced.

The court determined the proposed evidence was relevant to show appellant had a proclivity for having sex with underage females. However, it felt the evidence was unduly prejudicial under section 352 for the reasons stated by defense counsel. Therefore, it "loosely denied" the prosecutor's motion. In emphasizing the tentative nature of its decision, the court told counsel the admissibility of appellant's prior sexual misconduct was a "moving target" that could change depending on how the rest of the evidence unfolded at trial. It warned defense counsel that if any evidence of appellant's good character was introduced, it could very well "open the door" to evidence of that misconduct.

Given these remarks, defense counsel was understandably nervous about having Cynthia testify on appellant's behalf. Before calling her as a witness, he told the court that when questioning her on direct examination he intended to steer clear of any questions related to the topic of appellant's character. However, he was concerned about the scope of Cynthia's cross-examination. In particular, he feared the prosecutor might "intentionally or unintentionally" elicit a response from Cynthia that would open the door to evidence of appellant's prior sexual misconduct.

For her part, the prosecutor said she intended to thoroughly cross-examine Cynthia to explore her potential biases and the basis of her opinions. While she promised not to ask Cynthia about appellant's prior sexual misconduct, she said that if Cynthia "testifies to things that . . . open the door" to that issue, she would then seek the court's permission to introduce evidence on that subject. The court did not anticipate that happening. In fact, it said it would be "very surprised" if Cynthia's testimony triggered the introduction of evidence regarding appellant's prior sexual misconduct. However, it

cautioned, "The door sometimes opens in very odd ways. Sometimes it's just a crack, but usually that's enough."

With that, defense counsel proceeded to call Cynthia to the witness stand. Most of the testimony he elicited from her was intended to tarnish Madison's character and credibility. Cynthia painted Madison as a deceptive, troubled child who had a long history of lying and unruly behavior. Based on Madison's Facebook posts, Cynthia testified she believed Madison was having sex with boys, but she did not believe Madison was having sex with appellant.

On cross-examination, the prosecutor questioned Cynthia about why she felt that way. Here is how the questioning transpired:

"Q. So why is it you believe [Madison] when she's texting [about having sex with boys] on Facebook, but you don't believe [her] when . . . she is claiming [to have had] sex with [appellant]?

"A. I do not believe [appellant] ever laid a hand on either one of my girls in that way at all.

"Q. Okay. So you just absolutely refuse to believe that?

"A. It's not true.

"Q. Okay. And why is it that you believe that he is not capable of doing that?

"A. I just don't think that he's capable of doing it.

"Q. Why?

"A. He's just not capable of doing it. I don't see that in him. He's never indicated anything. I've never seen anything. Neither one of the girls have ever felt threatened or scared or forced or anything."

Based on this exchange, the prosecutor renewed her motion to admit the evidence of appellant's prior sexual misconduct pursuant to section 1108. She argued that by testifying that appellant was not "capable" of molesting Madison, Cynthia was

vouching for appellant's character, thereby opening the door to his prior misdeeds. (See § 1102.) Defense counsel vehemently disagreed, pointing out that Cynthia did not utter the word "capable" until the prosecutor brought it up. In his view, Cynthia was simply responding to the prosecutor's question when she gave her answer about why she did not believe appellant was capable of molesting Madison. Therefore, the door did not open due to accident or inadvertence; rather, the prosecutor purposefully "sandbagged" the defense by asking a question that was designed to subvert the trial court's earlier ruling respecting the admissibility of appellant's prior sexual misconduct.

The trial court did not see it that way. After reviewing the transcript of Cynthia's testimony and entertaining extensive argument on the issue, it determined the issue of whether Cynthia believed appellant was capable of molesting Madison arose spontaneously during the ebb and flow of cross-examination. At no point, the court noted, did the prosecutor ask Cynthia about appellant's prior sexual misconduct. Nor did she extract from Cynthia any information that she did not voluntarily disclose. In response to defense counsel's argument the prosecutor's questioning of Cynthia was "a backdoor way" of getting appellant's prior sexual misconduct into evidence, the court responded as follows:

"Oh, I don't know. . . . It may be a backdoor way of getting [in the section] 1108 [evidence], but that doesn't mean there is anything inappropriate or wrong with it. The risks were there. There were certain questions that [came] up, and there were no objections to them. [The objections] didn't happen. And had they happened I don't know what the ruling would have been. But that's a moot issue because the objections were not there. [¶] I am going to let [the evidence] in. I believe that door has been opened at this point in time."

"Opening the door" is a shorthand reference to the longer, analytically sound premise that evidence which might not ordinarily be admissible can become so through the vagaries of the art of examining witnesses. The shorthand reference

developed as a way of saying, "As we initially viewed the case, this evidence was not relevant, but now something unexpected has happened and this evidence has become relevant. The door to relevance has opened and now I wish to go through it."

Usually this argument is raised when an opponent's witness goes further than expected, but there is nothing in law or logic that requires that the *opponent* open the door. It is *testimony* that now must be impeached or rebutted with evidence previously thought inadmissible. So it makes no difference who has *elicited* the testimony – except in cases of misconduct, which the court here did not find. The court's ruling was, essentially that it might – or might not – have excluded the evidence upon objection, but no objection having been made, the evidence was in and now could be countered.

While the phrase "opening the door" is overused, often treated as some kind of magic incantation that allows for a wholesale revision of the evidentiary cause of the case, it has a very limited application. Evidence can be so admitted only to provide context for the specific fact testified to, in order to prevent the jury from receiving a false or distorted view of the evidence, or to cure the admission of prejudicial evidence.

Here it was offered for the former reason. The trial court felt the jury would get an incomplete understanding of defendant's character if Cynthia's testimony were allowed into evidence without facts that would balance that view – facts which the court had previously considered of dubious relevance – so it allowed that evidence in.

In light of that ruling, defense counsel moved for a mistrial. The motion was denied, and following the completion of Cynthia's testimony, Nancy was allowed to testify on rebuttal about her sexual relationship with appellant, as set forth in the facts above. This was a discretionary call, which we discuss below. But first we must deal with appellant's prosecutorial misconduct argument.

As the representative of the government in a criminal case, "'It is a prosecutor's duty "to see that those accused of crime are afforded a fair trial." [Citation.]'" (*People v. Daggett* (1990) 225 Cal.App.3d 751, 759.) A prosecutor "may

strike hard blows, [but she] is not at liberty to strike foul ones." (*Berger v. United States* (1935) 295 U.S. 78, 88.) "Under California law, a prosecutor commits reversible misconduct if . . . she makes use of 'deceptive or reprehensible methods' when attempting to persuade either the trial court or the jury, and when it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights . . . but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action '"so infected the trial with unfairness as to make the resulting conviction a denial of due process."' [Citations.]" (*People v. Rundle* (2008) 43 Cal.4th 76, 157, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

However, "[t]o preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely objection[.]" (*People v. Brown* (2003) 31 Cal.4th 518, 553.) The objection requirement is designed to give the trial court an opportunity to consider the claim of misconduct and to remedy its effect. (*People v. Noguera* (1992) 4 Cal.4th 599, 638.) The requirement will only be excused under limited circumstances, such as when an objection to the alleged misconduct would have been futile. (*People v. Panah* (2005) 35 Cal.4th 395, 462.) However, a defendant invoking the futility exception "must find support for his or her claim in the record. [Citation.] The ritual incantation that [the] exception applies is not enough." (*Ibid*.)

As the trial court recognized below, defense counsel did not object when the prosecutor asked Cynthia why she believed appellant was incapable of molesting Madison. Appellant contends it would have been futile to do so because "[t]rial counsel had objected numerous times against the introduction of the [section] 1108 uncharged crimes. He had no reason to believe that the improper eliciting of character evidence [from Cynthia] by the prosecution would result in [the section] 1108 evidence finally being admitted[.]"

But if defense counsel felt the prosecutor's questions to Cynthia were improper he should have said something *before* Cynthia answered them. This would not have been a particularly difficult task. All he would have had to do when the prosecutor asked Cynthia why she believed appellant was incapable of molesting Madison was object and request a sidebar. Then he could have argued the question was improper in that it was likely to elicit evidence about appellant's character, which might open the door to the section 1108 evidence. The court had previously cautioned both sides about getting into the issue of appellant's character and clearly expressed its concern that the "door" might be opened inadvertently. Counsel should have been especially vigilant during cross-examination.

The court was fully aware of appellant's concern that if the prosecutor elicited evidence of appellant's good character from Cynthia it could very well trigger the introduction of bad character evidence in the form of his prior sexual misconduct. Thus, if defense counsel had objected to the question at issue *before* Cynthia answered it, there is a good chance the court would have advised the prosecutor to either rephrase the question or move on to another line of inquiry altogether. After all, the court had previously ruled the section 1108 evidence was inadmissible, and there was no basis for the court to reconsider that decision until the prosecutor started cross-examining Cynthia about why she believed appellant was incapable of molesting Madison. At the very least, an objection to that question would have provided the trial court with the opportunity to prevent the introduction of the very evidence that appellant now contends rendered his trial unfair. Under these circumstances, the futility exception is inapt and appellant forfeited his right to challenge the prosecutor's conduct.

Alternatively, appellant argues his attorney was ineffective for failing to preserve the issue of prosecutorial misconduct for purposes of appeal. In so arguing, appellant asserts that reasonably competent counsel would never have made such an "obvious" mistake as "failing to object to the very questions whose answers would

abrogate all the efforts that defense counsel had put into keeping the [section] 1108 evidence away from the jury." We agree. In fact, the premise of this assertion – that an objection would have gone a long way toward ensuring that particular evidence was kept out of the trial – is precisely why the futility exception to the forfeiture rule does not apply in this situation.

However, in order to prevail on a claim of ineffective assistance of counsel, a defendant must prove he suffered prejudice as a result of his attorney's deficient performance. (*People v. Riel* (2000) 22 Cal.4th 1153, 1175.) Relief will not be granted unless it is reasonably probable the defendant would have achieved a more favorable result absent counsel's errors and/or omissions. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694.) That probability does not exist in this case for two reasons: 1) The prosecution's case against appellant was very strong; and 2) the section 1108 evidence was not particularly inflammatory.

As for the strength of the prosecution's case, the record shows Madison repeatedly and consistently maintained that appellant raped and molested her. In fact, she told her friend Jessica that appellant was raping her even before the police got involved in the case. Madison also had a vaginal tear that corroborated her rape claim, and the DNA evidence implicated appellant as the likely source of the sperm that was found in her cervix. Based on Cynthia's testimony about her post-coital cleaning habits, it is possible appellant's sperm could have made its way into Madison's cervix while she was washing herself in the shower. However, when asked about the possibility of such an innocent DNA transfer, the expert witnesses at appellant's trial were very skeptical; neither one of them was aware of any case or study in which a transfer of DNA had occurred under the circumstances described by Cynthia.

Even so, appellant attempts to downplay the significance of the DNA evidence that was presented at his trial. Despite the fact his DNA profile matched the DNA profile of the sperm found in Madison's cervix, he argues that doesn't really mean

much because the DNA experts testified that approximately 1 in 60,000 people in the world, and 1 in 5,500 males, share that particular profile. Appellant correctly points out those probabilities are relatively modest compared to those that have been offered in other cases. (See, e.g., *People v. Soto* (1999) 21 Cal.4th 512, 533 [expert testified that only 1 in 6.7 billion people had the DNA profile at issue in that case].) However, the statistical estimates given in this case were based on random matching probabilities. They did not take into account the particular circumstances surrounding the charged offenses, such as the fact appellant had virtually unlimited access to Madison during the time in question. And, the 1 in 5,500 probability estimate was derived using the Y-STR testing method, which is known to generate conservative probability figures. (See *People v. Stevey* (2012) 209 Cal.App.4th 1400, 1406-1416.)

The truth is, the odds that the sperm found in Madison's cervix got there by means other than sexual intercourse with appellant were exceedingly small, considering all of the evidence in the case. So even if the trial court had excluded Nancy's testimony about her sexual relationship with appellant, the prosecution's case still would have been very compelling.

As for the impact of Nancy's testimony, we do not believe it was nearly as harmful to appellant's case as he makes it out to be. Although Nancy testified she met appellant when she was 14 years old, she said she did not have him as a teacher and really get to know him until she was in the 11th and 12th grade. And by the time she moved into appellant's home and started having sex with him, she was nearly 18 years old. After that point, her friendship with appellant turned romantic and they eventually got married. While their marriage ended after appellant became abusive, Nancy testified she and appellant loved each other and had many happy years together. For all the reasons trial counsel articulated in arguing against its admissibility, taken as a whole, Nancy's testimony was not particularly inflammatory, and it paled in comparison to

Madison's description of what appellant allegedly did to her. We do not believe the jury would have been unduly swayed by it.

All things considered, it is not reasonably probable appellant would have obtained a more favorable result had defense counsel objected to the prosecutor's questioning of Cynthia that opened the door to Nancy's testimony. Therefore, the failure to object did not constitute ineffective assistance of counsel. No Sixth Amendment violation has been shown.

Admissibility of Nancy's Testimony

Appellant contends that even if the prosecutor did not commit misconduct by opening the door to Nancy's testimony, the trial court should have excluded her testimony on the basis it was irrelevant and unduly prejudicial. We disagree.

Evidence of the accused's prior bad acts is generally inadmissible (§ 1101, subd. (a)), unless it helps prove a fact other than his disposition to commit the charged offense. (*Id*., subd. (b).) However, evidence of prior sexual misconduct is treated differently; pursuant to section 1108, such evidence is admissible to prove the defendant's propensity for sexual misconduct in a sex crimes prosecution, so long as it is not unduly prejudicial under section 352. (§ 1108, subd. (a).)

Section 352 empowers trial courts to exclude evidence if its probative value is substantially outweighed by the probability its admission would cause undue delay, confusion or prejudice. "'The "prejudice" referred to in . . . section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging."' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

In this case, the evidence of appellant's prior sexual misconduct with Nancy was fairly remote in terms of its temporal proximity to the charged offenses, but it was not confusing, contested or time consuming. And compared to the evidence of the

charged offenses, it was relatively benign. These factors lessened the prejudicial impact of the subject evidence. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 205; *People v. Ewoldt* (1994) 7 Cal.4th 380, 405.) Nonetheless, appellant contends his sexual misconduct with Nancy was so dissimilar to the charged offenses as to have no probative value whatsoever. We cannot agree.

Contrary to appellant's assumption, similarity between the uncharged and charged sex crimes is not a requirement under section 1108. (*People v. Frazier* (2001) 89 Cal.App.4th 30, 40-41.) In fact, courts have recognized that imposing a similarity requirement would undermine the purpose of the statute and ignore the fact many sex offenders are not specialists in terms of the crimes they commit. (*People v. Soto* (1998) 64 Cal.App.4th 966, 984.)

As a practical matter, it is true that the less similar the uncharged sex crimes are to the charged offenses, the less relevance the former will likely have in terms of proving the defendant's propensity to commit the latter. (See, e.g., *People v. Earle* (2009) 172 Cal.App.4th 372, 398 [questioning whether the defendant's act of indecent exposure was relevant to prove he had a propensity to commit rape].) Lack of similarity between the charged and uncharged offenses can also make it more difficult for the uncharged crimes to pass muster under section 352. (See, e.g., *People v. Harris* (1998) 60 Cal.App.4th 727, 738-741 [evidence regarding the defendant's prior sex offense should have been excluded because, inter alia, it was much more inflammatory and violent than the charged sex crimes].) However, there are no hard and fast rules respecting the admission of uncharged sex crimes; each case must be decided on its own facts, and on appeal we must keep in mind that the determination of whether such evidence should be admitted "'is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence.'" (*Id*. at p. 730, quoting *People v. Fitch* (1997) 55 Cal.App.4th 172, 183.)

We cannot say the trial court abused its broad discretion in admitting evidence that appellant had unlawful sexual intercourse with Nancy to prove his propensity to commit the charged offenses. There were, after all, some similarities between the subject offenses. For example, appellant did not use any physical force or violence to commit either the charged or uncharged offenses, and appellant had relationships with both the charged and uncharged victims, they were not strangers. Indeed, the evidence suggests appellant targeted Nancy and Madison because they came from broken homes and had emotional vulnerabilities he could take advantage of. Although Nancy was almost 18 years old when appellant first started having sex with her, he knew she had been a victim of sexual abuse, and, in fact, that is what they were talking about right before he coaxed her into the bedroom for their first sexual encounter. So, while it is clear the overall circumstances of appellant's relationship with Nancy were much different than the circumstances surrounding his relationship with Madison, there were sufficient similarities to support the inference appellant was sexually attracted to underage females.

For all these reasons, we uphold the evidence of appellant's prior sexual misconduct with Nancy. The court's decision to admit this evidence did not constitute an abuse of discretion under section 352 or undermine appellant's fair trial rights. And even if the evidence should have been excluded, reversal is not required because, as we have explained, it is not reasonably probable appellant would have obtained a more favorable result without it. (See *People v. Samuels* (2005) 36 Cal.4th 96, 113 [applying reasonable probability standard to the erroneous admission of character evidence].)

Remaining Claims

Appellant's remaining claims merit less attention. He contends that, assuming the evidence regarding his relationship with Nancy was admissible, defense counsel should have objected to certain aspects of the relationship because they portrayed him as a "monster." In this regard, appellant points out that not only did Nancy testify

she began having sex with him when she was only 17 years old, she also revealed that appellant was married at the time and that he urged her to have an abortion after she became pregnant.

However, in order for the jury to fully understand the section 1108 evidence, it was necessary for Nancy to disclose certain details about how she and appellant met and how their relationship evolved over the years. While some of those details were less than flattering, Nancy also spoke to the fact that she and appellant eventually fell in love and were happily married for some years. On balance, Nancy's testimony about the less flattering aspects of her relationship with appellant was not so crucial and prejudicial that it was likely to have changed the outcome of the trial, and we cannot say defense counsel was ineffective for failing to object to any particular aspect of it.

Lastly, while appellant alleges cumulative error rendered his trial unfair, we are not convinced there were *any* individual errors or constitutional flaws in the trial proceedings. As such, there is no basis to reverse.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.